In the

SUPREME COURT OF THE UNITED STATES

October Term 1975

No. 75-812

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, Former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Petitioners,

-against-

ELLIOTT H. VELGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Introductory Statement

This is a petition for certiorari to the United States Court of Appeals for the Second Circuit for review of a judgment filed September 9, 1975, which reversed an order and judgment of the United States District Court for the Southern District of New York. The District Court had dismissed the complaint and granted judgment to the defendants (here the petitioners) on all issues.

Citations Below

Neither the opinion of the Court of Appeals nor that of the District Court are reported as yet. Both are appended hereto.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Second Circuit here sought to be reviewed was filed September 9, 1975. Certiorari jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

In this proceeding brought pursuant to 42 U.S.C. §1983, the plaintiff, a former New York City probationary police officer, whose employment was terminated without his having been afforded a hearing as to the reasons for his termination, seeks, inter alia, reinstatement and damages for alleged injury to his reputation. A trial was held on the question whether the Police Department had stigmatized him so as to foreclose him from other job opportunities. There was testimony that, inter alia, he had been terminated from a job as a Penn Central security officer after a Penn Central captain, with the plantiff's express written authorization, saw his personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt.

The Court of Appeals, rejecting

the findings of the trial court, concluded that the plaintiff had met his burden of showing stigma. It found that governmental and private police agencies have access to the Police Department's personnel files and that the serious derogatory material in the plaintiff's file, which reflected on his mental condition, had foreclosed him from employment in both the public and private sectors. The Court concluded that unconstitutionality is not avoided by a Departmental requirement that the Department obtain written authorization from the former employee before it releases any material in his personnel file. Thus, the impact of the Court's decision is to bar the Department from informing another police agency of material which may be highly relevant to the sensitive tasks of an armed peace officer if, prior to his termination from probationary employment with the

Department, it has not given him notice of charges and a hearing, even though the former probationer himself has authorized the release of his files.

There are two questions presented. The first is whether a public employer - in particular, a police agency - is constitutionally required to afford probationary employees a hearing prior to termination where there is derogatory and possibly stigmatizing material in his personnel file or else be foreclosed from releasing any material in that file to a prospective employer even where the former employee expressly authorizes release of such material to that employer.

The second question is, assuming a hearing is required, must there be a hearing on stated charges in order to effect termination or is the required hearing limited to affording the probationer the opportunity to clear his name of any stigmatizing charges.

Statement of the Case

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. The plaintiff, Elliott H. Velger, was appointed as a New York City probationary patrolman on August 15, 1972 (21a).* The Police Commissioner, having found his performance unsatisfactory, ordered his services terminated effective February 16, 1973 (10a). In accordance with standard procedures as to probationary employees, plaintiff did not receive a hearing prior to dismissal nor was he apprised of the reasons for his termination (6a).

On May 25, 1973, plaintiff commenced this action in the United States District Court for the Southern District of New York to have his dismissal vacated and annulled, to enjoin the defendants

* Numbers in parentheses followed by "a" refer to pages of the appendix in the Court of Appeals.

from refusing to employ him and for damages caused by injury to his reputation (8a-9a). Defendants moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted (12a-13a). In July, plaintiff moved for an order convening a three-judge court to declare section 63 of the New York State Civil Service Law, which mandates probationary periods for employees, unconstitutional (14a).

Judge GURFEIN denied the motion to convene a three-judge court on the grounds that substantial questions of constitutionality were not included in the complaint and because the Second Circuit, in Russell v. Hodges, 470 F. 2d 212, 218 n. 6 (1972), had already decided that plaintiff's contention was "frivolous" (31a). He determined that plaintiff,

as a probationary employee, had no property interest in not being terminated such as would require a hearing. However, he permitted the filing of further affidavits and the amendment of the complaint to incorporate the plaintiff's new charge that he had been denied employment opportunities because of derogatory material in his personnel file which he had never seen or been allowed to refute (35a-36a, 45a).

On November 25, 1974, a hearing was held before Judge WERKER on the issue of whether the plaintiff had been stigmatized and foreclosed from employment opportunities because of the personnel file compiled by the Police Department. The hearing disclosed that the plantiff had been terminated from a job as a Penn Central security officer

after a Penn Central captain, with the plaintiff's authorization, saw his New York City Police Department personnel file and gleaned from it that he had been terminated because he had put a revolver to his head in an apparent suicide attempt (111a,113a,115a-119a). There was also testimony as to the general policies and practices of the Department (130a, 133a-141a), and as to the plaintiff's efforts to find other employment (93a-99a).

The plaintiff has never denied that he put a gun to his head. All that he claimed in his brief to the court below (p.16) was that he should have been permitted to "explain" the "alleged incident": "It might all have been a mistake. It could also have been a little horseplay."

The District Court concluded that the plaintiff (A 21)*:

* Numbers in parentheses preceded by "A" refer to pages of the appendix annexed hereto.

> "has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof."

The Court of Appeals rejected as "clearly erroneous" the District Court's finding that the plaintiff had not proved stigma and found that "the manner in which personnel records are made available to inquiring public and private employers insures that serious derogatory information in the file will stigmatize the dischargee" (A11-A12). The Court refused to attach any significance to the Department's requirement that Penn Central, a private employer, present written authorization from the plaintiff before it would

release his personnel files on the ground that, if authorization were refused, the applicant would be denied employment (A 10).*

REASONS FOR GRANTING THE WRIT

(1)

In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court set forth the guidelines for determining when a public employee is entitled to a trial-type hearing prior to termination of his employment. It held that procedural due process applies only when the interest in continued employment is within the Fourteenth Amendment's pro-

* We annexed to our brief in the Court of Appeals a directive from Police Commissioner Michael J. Codd, dated April 2, 1975, which states that: "In any case where a probationary employee of this Department is terminated, access to his personnel file by any prospective employer, private or governmental, will be granted only upon the probationary employee executing a written authorization for such prospective employer to inspect his file."

tection of liberty and property. The question before the Court below was whether the actions of the Police Department were violative of the plaintiff's right to liberty.* We submit that the conclusion that they were represents an unwarranted extension of the procedural due process rights of public employees as laid down in Roth and a departure from the balance carefully drawn in Roth between the rights of public employees and those of their employers.

In the case at bar, no reason was given for the plaintiff's termination and there was no effort on the part of the Police Department to blacklist him or to

* Judge GURFEIN rejected the claim of the plaintiff herein that he had a property interest in his probationary position (34a). The Court of Appeals stated (A 7): "We find it unnecessary to decide whether Velger had a property right in his position and we do not reach that point."

publicize or circulate derogatory information about him. Cf. Roth, supra, at pp. 573-574. Nonetheless, under the ruling of the Court below, even where a former probationary employee executes a written release authorizing a prospective employer to see his personnel file, the Police Department must not allow the file to be released if the former probationary employee had not been given a hearing on stated charges prior to his termination. New York State law does not require such a hearing for termination of probationary employees and Roth makes clear that under the Constitution a public employer ordinarily has the right to terminate without a hearing employees who do not have State law tenure rights or contract rights in continued employment. However, the practical result of the decision here sought to be reviewed is to require either that all public employees (probationers, provisionals, and those exempt from the civil

service rules, as well as tenured civil servants) be afforded a hearing on stated charges prior to termination, thereby eliminating the distinction drawn in Roth, or to preclude public employers from disclosing information about former non-tenured employees even where the former employees desire and authorize such disclosure.

The Untoward Consequences of the Decision Below

By way of illustration, we ask the Court to consider the situation of a Justice of this Court, with a confidential clerk who has no property interest in his job and who proves unsatisfactory because, for example, he has disclosed the Court's decision on a still pending case. The Justice decides to fire the clerk. He must then decide whether to hold a full-scale hearing on stated charges, for, if he does not, should his former clerk apply for a position with another judge, he will be barred from revealing

anything whatever about the former clerk's behavior. This would be so even if the fact of the disclosure was undisputed. We submit that Roth does not require such a result and should not be so extended.

Moreover, we submit the decision below is especially unfortunate in its application to a police agency. To require the New York City Police Department to withhold information about a former employee from other police agenices who are considering hiring him, arming him and assigning him to the sensitive tasks of a police officer, where that former employee has himself authorized disclosure, imposes an undue restriction on the Department in the fulfillment of its obligations to the public. Here the former employee does not deny that while a trainee he put a gun to his head; and there can be no doubt that such

an act is a constitutional basis for termination of his probationary employment. The Department should not be barred from disclosing its files to other police agencies with the former employee's permission.

The rule which we urge here is not inconsistent with this Court's decision in Roth. It does not allow unfettered freedom to publish derogatory information about former employees - in the case of excessive publication of such information or publication for malicious reasons, the former employee would have available to him his common law remedies for defamation and his rights under the civil rights laws.

Rather, under the rule which we urge all that would be allowed would be very limited disclosure pursuant to express authorization by the former employee. On balance, we submit, this adequately protects the interests sought to be protected by Roth and at the same time protects the interests of public employees and society in general.

(2)

In Roth this Court, in discussing the kind of hearing to be afforded a public employee whose rights to liberty are implicated by his discharge, stated (408 U.S. at 573, n. 12):

> "The purpose of such notice and hearing is to provide the person an opportunity to clear his name. Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons."

The Court below held that the Police Department must either provide for confidentiality or else "rudimentary procedural due process requires that such notice of charges and a hearing be afforded before a dismissal can be effective" (A 14). Thus, the Court appears to have neglected the distinction drawn in Roth between the kind of hearing to be afforded an employee with a property interest in his employment, who cannot be terminated unless stated charges are proved at a hearing, and the kind of hearing to be afforded a probationary employee whose termination may involve a stigma and whose hearing is for purposes of clearing his name. For this reason as well, a writ of certiorari should be granted.

The questions of when a hearing must be afforded to a public employee, and of the nature of such a hearing, are questions which affect the administration of governmental agencies throughout not only the City of New York but the entire country. We submit that the decision of the Court below represents an unwarranted departure from this Court's comprehensive ruling in Board of Regents v. Roth, and, because of the importance of such a departure, is a decision which warrants review by this Court.

CONCLUSION

A writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

December 1, 1975.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel of the
City of New York,
Attorney for Petitioners.

L. KEVIN SHERIDAN.
NINA G. GOLDSTEIN,

of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 912 - September Term, 1974.

(Argued May 28, 1975 Decided
September 9, 1975.)

Docket No. 75-7042

ELLIOTT H. VELGER,

Plaintiff-Appellant,

against

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants-Appellees.

B e f o r e :

CLARK, Associate Justice,*
HAYS and MANSFIELD, Circuit Judges.

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*Associate Justice; United States Supreme Court (Ret.) sitting by designation.

Appeal from an order and judgment entered in the United States District Court for the Southern District of New York, Henry F. Werker, Judge, which dismissed the complaint brought pursuant to 42 U.S.C. §1983 and granted judgment for the defendants on all issues.

Reversed.

SAM RESNICOFF, Esq., New York, New York, for Appellant.

W. BERNARD RICHLAND, Corporation Counsel, City of New York, New York, for Appellees.

CLARK, Associate Justice:

In this appeal of his case brought under 42 U.S.C. §1983,[1] Elliott H.

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1 Title 42 of the United States Code, Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit, in equity, or other proper proceeding for redress.

Velger, appellant, seeks reversal of a judgment refusing: 1) his reinstatement as a probationary patrolman with the New York City Police Department; and 2) the recovery of damages for injury to his reputation because of his summary dismissal. On February 16, 1973, he was dismissed without cause, without a hearing, and without being apprised of the grounds therefor.[2] Velger had enlisted

2 The suit was filed on May 25, 1973, against Donald F. Cawley, Police Commissioner, Patrick Murphy, former Police Commissioner, Harry I. Bronstein, Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham Beame, as Comptroller, City of New York,

in the force as Patrolman, Police Trainee, on January 30, 1970. He served in that position until August 15, 1972, shortly after his twenty-first birthday, when he was elevated to the position of probationary Patrolman. He remained in this position until his abrupt dismissal. He had served three years and had only five more months to serve on his probationary period.

While prosecuting his suit, Velger sought other employment. On September 10, 1973, he was provisionally

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and the City of New York. The appellant originally sought a mandamus requiring the defendants to reinstate him and an order empanelling a three-judge court to test the constitutionality of Section 63 of the New York Civil Service Law. Section 63 mandates probationary periods for New York civil servants and was the authority for the regular one year probationary Velger was serving when he was dismissed.

The district court held the claim as well as the request for a three-judge court to be "frivolous" under this Court's ruling in Rusell v. Hodges, 470 F.2d 212 (2d Cir. 1972). See Velger v. Cawley, 366 F. Supp. 874 (S.D.N.Y. 1973).

employed by the Penn Central Railroad as a patrolman-watchman. He had placed fourth out of twenty applicants in competitive testing for the position. But after some sixty days with the Penn Central, he was discharged solely because of the results of an inspection of his personnel record in the New York City Police Department. He had granted Penn Central authorization to see his records on file at the Department. The trial judge found that Penn Central "gleaned" from Velger's personnel file that he had [sic] "had been dismissed because while still a trainee he had put a revolver to his head in an apparent suicide attempt."[3]

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3 Velger was not made aware of the accusation. In his brief, he says:

> Since the alleged incident occurred at the Police Academy and 'four or five individuals' were involved appellant should have been given an opportunity to explain. It might all have been a little horseplay...

Velger's subsequent attempts to secure work included taking over one hundred civil service examinations, of which he passed ninety-seven per cent and scored many high marks. There is every indication that he would have been successful but for the allegations in his New York City Police Department file.[4] In the private sector, he applied for numerous positions,[5] but was ultimately refused employment; again his personnel

4 A typical example was the Plainfield, New Jersey, Police Department. It told Velger that his hiring date would be three weeks from the receipt of its notification unless a character investigation required that he be turned down. He was notified but then never hired. Other police positions included: the police departments of Yonkers, N.Y., Jersey City, N.J., and Washington, D.C.; the Triborough Bridge Authority; the Executive Protective Service; Suffolk County Police; and others.

5 Among the companies to which Velger applied for security police positions were American Bank Note Company, Bonwit-Teller, several Manhattan banks, and the Penn Central Railroad.

file seems to have prevented his employment.[6]

The trial court dismissed the complaint in two stages: first, by holding that Velger's status was probationary and hence he had no property right in the position, and, second, by finding that he had failed to meet his burden of proof that a stigma had attached because of his discharge. Judgment was entered for the City of New York and its officials on all issues. We do not agree. We find it unnecessary to decide whether Velger had a property right in his position and we do not reach that point. We do, however, find that a stigma attached because of his dismissal and that he was, therefore,

6 Ironically, at the time of trial Velger was employed on a probationary basis in a clerical position with the New York City Police Department. That job, too, was terminated at the expiration of the probationary period on January 17, 1975.

entitled to a hearing to confront the allegations placed in his personnel file. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972).

1. The Nature of the Charge on which Dismissal was Predicated:

It stands to reason that any charge that justifies dismissal is a most serious one. Here the exact language of the charge is not known,[7] but it appears to state that Velger "while still a trainee ... had put a revolver to his head in an apparent suicide attempt." Such a

7 Appellees resisted all efforts to obtain from them an explanation for the dismissal. Their response to Velger's formal interrogatories prior to trial included the claim that as a probationary patrolman he had no right to a statement of reasons for his termination. The testimony of the Penn Central officer, who investigated Velger's personnel file about the apparent suicide attempt report, was that the attempt incident was the reason for the dismissal. No other explanation was ever offered. Indeed, appellees resisted Penn Central's attempts to verify the report.

charge suggests to most of us such severe mental illness that it deprives one of the capacity to do any job well. It thus differs from the usual derogatory charge that is levelled at the capacity to do a specific job. Certainly, no more serious charge could be levelled at a police officer.

Moreover, the "rookie" officer has the greater hazard because he has none of the job protection guarantees that a seasoned officer enjoys. Ordinarily, he can be severed from the force without any notice of charges or a hearing being afforded him. Police authorities must, therefore, exercise the greatest degree of care in dealing with probationary officers to make certain not only that their discharge decisions are just but also that their reasons are kept confidential. Here New York City admits that it grants ready

access to its confidential personnel files to all governmental police agencies. In a case like the present one this could have the effect of closing the public sector to the probationary police dischargee and depriving him of employment in the largest and most desirable segment of his profession. The same result, in reality, is true in the private sector because New York City answers all inquiries for permission to see personnel files with the suggestion that inspection will be permitted with the consent of the dischargee. The dischargee is then placed "between the devil and the deep blue sea"; he loses whatever his choice. Who would employ an applicant who refused to give authorization? Who would employ one who gives authorization but whose file suggests that he made an "attempt" at suicide?

2. The Requirements of Procedural Due Process:

In light of the rationale behind both Board of Regents v. Roth, supra, and Perry v. Sinderman, supra, we must reverse the lower court's judgment. Those cases teach that when either a deprivation of a property interest, such as in a permanent job, or a deprivation of liberty, such as in a stigma that operates to foreclose other employment opportunities, result from the decision to discharge, due process requires that notice of the charges and a hearing must be granted to the dischargee. Perhaps the discharge of a police officer is stigmatization per se. But we need not announce such a "brass collar" rule, for here the record reeks of the stigma that attached to Velger. The stigma foreclosed employment in both the public and private sectors. First, the manner in which personnel records are made available to inquiring public and private employers

insures that serious derogatory information in the file will stigmatize the dischargee. Second, the lax procedures in the practice of the New York City Police Department, as it discharges probationary officers without a statement of reasons or hearing, encourage the very harm that Roth and Perry urged be prevented. Here, from what little is known, Velger's accusers are not named and his actions are not described in any detail. The framework in which the alleged suicide attempt occurred included the presence of five fellow trainees, but no explanation exists for such an unlikely audience to an attempted suicide. No date or hour for the incident is specified, although it allegedly occurred while Velger was a trainee. His appointment to patrolman was seven months old and he had been with the force three years before the discharge

action, supposedly based upon the earlier incident, was taken.

As this Court so well stated in Lombard v. The Board of Education of the City of New York, 502 F.2d 631 (1974):

> A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has not opportunity to meet the charge by confrontation in an adversary proceeding. Id. at 637-8.

3. The Remedy:

We, therefore, hold that the findings of the trial court that no proof of stigma was made are clearly erroneous. This result need not have any material impact upon the practice of not affording a hearing to probationary dischargees. The appellees could change their disclosure procedures to prevent the dissemina-

tion of derogatory and possibly stigmatizing allegations unless notice of the charges and a hearing are first afforded to the dischargee. Otherwise, rudimentary procedural due process requires that such notice of charges and a hearing be afforded before a dismissal can be effective. Reversed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELLIOTT H. VELGER,

Plaintiff,

-against-

DONALD F. CAWLEY, Police Commissioner, City of New York, PATRICK V. MURPHY, former Police Commissioner, City of New York, THE CITY OF NEW YORK, HARRY I. BRONSTEIN, Personnel Director and Chairman, New York City Civil Service Commission, and ABRAHAM D. BEAME, as Comptroller, City of New York,

Defendants.

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OPINION

73 Civ. 2350 (HFW)

HENRY F. WERKER, D. J.

Plaintiff, Elliott H. Velger, has brought this action against the City of New York, the Police Commissioner of the City of New York, the Personnel Director and Chairman of the New York City Civil Service Commission, and Abraham D. Beame as Comptroller of the City of New York, for injunctive and declaratory relief as well as damages. Asserting jurisdiction

under 28 U.S.C. §§ 1331 and 1334(3), (4), 42 U.S.C. §§ 1981 and 1983, and the Fourteenth Amendment, he alleges that after three years with the New York City Police Department as a "police trainee," and six months as a "probationary patrolman," he was discharged without a hearing or statement of charges against him. He asks this court to (a) declare such termination violative of the due process and equal protection clauses of the Fourteenth Amendment, (b) issue a writ of mandamus directing defendants to reinstate him as a patrolman, (c) enjoin defendants from refusing to employ him in the future, and (d) grant him $50,000 in damages.[1] After a trial on the merits, this court finds against plaintiff on all issues.

In an earlier decision on defendants' motion to dismiss for failure to state a claim, District (now Court

of Appeals) Judge Murray Gurfein found that as probationary patrolman with no contractual tenure, Mr. Velger had no legitimate expectation of continued employment as a patrolman, and therefore was deprived of no property interest when discharged. Velger v. Cawley, 366 F. Supp. 874, 887-78 (S.D.N.Y. 1973). In Judge Gurfein's view, the only issue which saved Mr. Velger's case from dismissal was whether in discharging him defendants imposed a stigma on Mr. Velger that foreclosed his freedom to take advantage of other employment opportunities. Id. at 878. In Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972), the Supreme Court ruled that such stigmatization without prior notice and the opportunity for a hearing constitutes deprivation of liberty with-

out due process of law.

In plaintiff's amended complaint the issue of stigma is raised by what he has chosen to call the first, third and sixth "causes of action." As to that issue, the court finds the following facts:

- Plaintiff served in the New York City Police Department as a police trainee from January 31, 1970 to August 15, 1972, a few days after his 21st birthday, when he was appointed a probationary patrolman. Six months later, by letter dated February 8, 1973, the Police Department discharged him. The letter indicated that the Department "has decided not to retain you as an employee of the Police Department, your capacity having been unsatisfactory to the Police Commissioner."

- After termination plaintiff applied for security officer positions in the private sector, and took civil service examinations for both state and federal government service, passing 97% of them. He was subsequently interviewed for several of the civil service positions, but not recalled. On each application form, where

asked to state whether he had ever been dismissed by an employer, plaintiff indicated his Police Department dismissal.

- One of the private sector jobs plaintiff sought was that of security officer with the Penn Central Railroad. After placing fourth in a field of 20 applicants tested, he was hired by the railroad for a probationary period on September 10, 1973. During the probationary period he was asked to sign, and did sign, a release form authorizing Captain Lonnie Hamilton of the Penn Central police to review his New York City Police Department records, and waiving any claims he might have against the Department for allowing Captain Hamilton to see them.

- The Police Department refused to release any information about Mr. Velger to Captain Hamilton by letter. When he phoned, he was informed that only if he were to present the waiver letter in person, in New York, would he be allowed to examine Mr. Velger's file. On doing so Captain Hamilton was given the personnel file, from which he gleaned that plaintiff had been dismissed because while still a trainee he had put a revolver to

his head in an apparent suicide attempt.

- Captain Hamilton tried to verify this story, but the Police Department refused to cooperate with him, advising him to proceed by letter. In light of his previous failure to obtain information by letter, Captain Hamilton declined to pursue the matter further; he returned to the Penn Central and recommended that Mr. Velger be terminated. This was done on November 11, 1973.

- The unwritten policy of the present administrative manager of Police Department personnel files is that no information whatsoever is released about former employees to any one in the private sector. (No evidence was introduced as to the policy of his predecessor during the time period in issue.) Unwritten policy with respect to government police agencies is that background information on former employees is available to those agencies as a matter of course. Although information as to why an employee was discharged is not formally available to such agencies, it appears to be possible for them to obtain it informally.

It is clear from the foregoing facts that plaintiff has not proved that he has been stigmatized by defendants. He has not established that information about his Police Department service was publicized or circulated by defendants in any way that might reach his prospective employers; in the one instance in which such information did reach an employer, it did so through plaintiff's own authorization. Plaintiff has not established that unfavorable information on his police record was released to any of the governmental agencies to which he has applied for employment. Lastly, plaintiff has not established or even attempted to show that those agencies have relegated his applications, for any reason whatsoever, to ineligible status. Plaintiff, in short, has not sustained his burden of proof.

As to the other five so called "causes of action" in plaintiff's amended complaint, none merit lengthy discussion. The eighth must be dismissed for lack of standing. See n. 1, supra. The seventh and fifth fail to state a claim on which relief can be granted. The fourth was previously decided against plaintiff by Judge Gurfein. 366 F. Supp. at 877-78. Lastly, the second does not state a cause of action. See Koscherak v. Schmeller, 363 F. Supp. 932 (S.D.N.Y. 1973) at 935-36.

Judgment is hereby granted for defendants without costs.

SO ORDERED

Dated: New York, New York
December 10, 1974.

HENRY F. WERKER
U.S.D.J.

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NOTES

1. He also asks that section 3 of the New York Public Officers Law and section 58 of the New York State Civil Service Law, establishing minimum age limits for certain public officer positions, be declared unconstitutional. For this purpose he requests the convening of a three-judge court. Plaintiff fails to include in his prayer for relief, however, a request that the enforcement of those statutes be enjoined. Under 28 U.S.C. §2281 a three-judge court is required only when such an injunction is sought. Astro Cinema Corp., Inc. v. Mackell, 422 F. 2d 293, 298 (2d Cir. 1970). See also Wright, Federal Courts at 190 (2d ed. 1970).

This court fails to see in any case how plaintiff has standing to challenge those statutes. Section 58, by its own terms, does not apply to the New York City Police Department. Furthermore, plaintiff has made no showing as to either section that he is, or has been, in any way harmed by them. (He likewise has made no offer of proof as to how or why they are unconstitutional.) Plaintiff's eighth cause of action, seeking a declaration of unconstitutionality, must therefore be dismisssed.